

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Criminal
Case No. 24/1405 SC/Criminal

BETWEEN: PUBLIC PROSECUTOR
AND: SAM LEWIS

Date of Trial: 29 July 2024, 1 August and 5 August 2024
Date of Verdict: 13 August 2024
Before: Justice M A MacKenzie
Counsel: Mr L Young for the Public Prosecutor
Mr N Morrison for the Accused

VERDICT

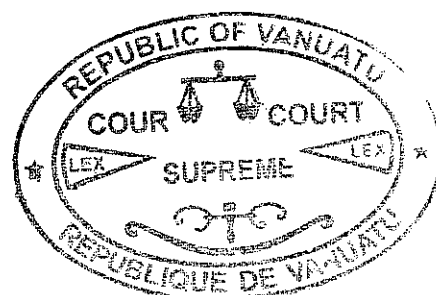
Introduction

The charges

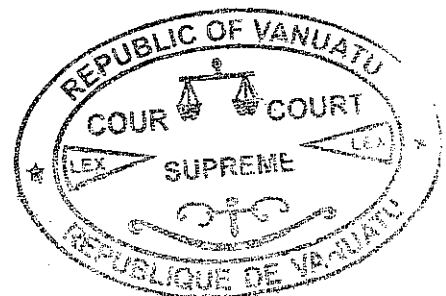
1. Mr Lewis faces two charges;
 - a. Threat to kill contrary to s115 of the Penal Code [CAP 135]
 - b. Attempted intentional assault contrary to ss28 and 107(a) of the Penal Code [CAP 135].

Relevant background

2. The charges arise out of an incident that took place at Mr Lewis' home address on 19 January 2021. The background to the incident is a rental arrangement that went wrong.



3. In the latter part of 2021, Mr de Groot arranged to rent a property called "Nomata" situated at Pangona following their return from Australia. The property is owned partially by the defendant, Mr Sam Lewis.
4. Mr de Groot and Mr Lewis agreed that the rent would be VT 50,000 per month plus utilities and the gardener's wages. The initial rental agreement was for six months. By 19 January 2021, the relationship had broken down and Mr Lewis wanted the property returned to him. There was agreement that the family could leave, but Mr Lewis wanted them to pay for the rest of the rental agreement. There is a factual dispute as to when Mr de Groot asked for return of the bond. It is unnecessary to resolve it as it is not material to either charge.
5. As at 19 January 2021, Mr de Groot decided to undertake his own final rental inspection, and asked a police officer, Kalontas Titus to accompany him. Following the rental inspection, Mr de Groot went to Mr Lewis' property to return the key. Officer Titus was with him. Mr de Groot wanted the bond returned and to be repaid for some repairs to the property. Prior to going to Mr Lewis' property, Mr de Groot had taken items from the property as security pending repayment of the bond.
6. A visit to Mr Lewis' property had not been arranged in advance. Mr Lewis and his partner, Katherine Bowden were at the property. Mr de Groot did not receive a warm welcome when he got to Mr Lewis' property. It is not in dispute that Mr Lewis was very angry with Mr de Groot.
7. The prosecution case is that Mr Lewis' anger manifested itself into a threat to kill Mr de Groot and an attempted assault. Mr de Groot's narrative about the alleged events is in part supported by what Officer Titus heard and observed. The prosecution also place weight on the fact that a few days later on 22 January 2021, Mr Lewis spoke to Mr Chillia at the gate of a property, Ocean Shores. The prosecution case is that Mr Lewis told Mr Chillia he would threaten Mr de Groot's wife and children if he saw them.
8. The defence case is that Mr Lewis would not have threatened to kill Mr de Groot or his family and did not attempt to assault him. Mr Lewis' narrative is supported by what his partner, Katherine Bowden heard and observed.
9. Mr Lewis was interviewed by Officer Jimmy on 22 January 2021 under caution. He said he would speak in Court. Mr Lewis wanted to make a complaint against Mr de Groot.



10. The delay in this case is very regrettable. As the Court of Appeal said in *Dawson v Public Prosecutor* [2010] VUCA 10, "The old adage that justice delayed is justice denied remains a fundamental precept today".
11. The alleged incident took place over 3 years ago. Nothing happened seemingly until a Complaint and draft Information were signed on 6 March 2024, 3 years later. It is little wonder that Mr de Groot was frustrated and concerned about the delay.

Trial issues

12. The issues are factual in nature;
 - a. Was there a threat to kill?
 - b. Did Mr Lewis attempt to assault Mr de Groot?

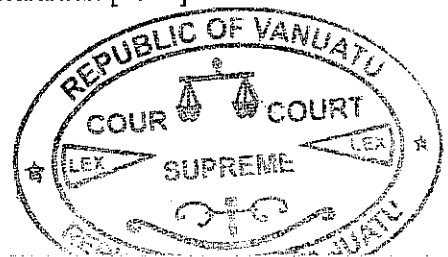
Submissions

13. At the conclusion of the evidence, counsel requested time to file written closing submissions. I granted the request. I have read and taken into account their submissions. I also heard oral closing submissions from both counsel.

Elements of the offences

Charge 1-threat to kill

14. This is a charge of threatening to kill contrary to section 115 of the Penal Code. The elements of threat to kill are;
 - a. Mr Lewis directly caused Mr de Groot to receive an oral threat to kill him
 - b. Mr Lewis knew the contents of the threat.
 - c. Mr Lewis intended the threat to be taken as real.
15. A review of cases tends to suggest some divergence as to the elements of threat to kill. I have derived the elements from *Public Prosecutor v Ahelmalahlah* [2021] VUSC 329.



On appeal, the nature of the threat was in issue (rather than the elements). But there was no issue raised about the elements, so respectfully I adopt the elements identified by the primary judge in that case.

Charge 2- attempted intentional assault.

16. The relevant sections of the Penal Code [CAP 135] are ss 28 and 107(a). While I agree broadly with counsel that the elements are an attempt to assault and an intention to assault, I consider the elements of the charge are;
 - a. That Mr Lewis had an intention to assault Mr de Groot.
 - b. Mr Lewis must then have undertaken an act, or omitted an act, as a step towards committing that crime
 - c. That act must be sufficiently proximate or immediately connected to the intention to assault Mr de Groot.

17. The elements relating to an attempt are drawn from *Bakeo v Public Prosecutor* [2023] VUCA 24. That case involved a charge of attempted intentional homicide, not attempted assault. However, the second and third elements of the charge relate to the issue of what constitutes an attempt.

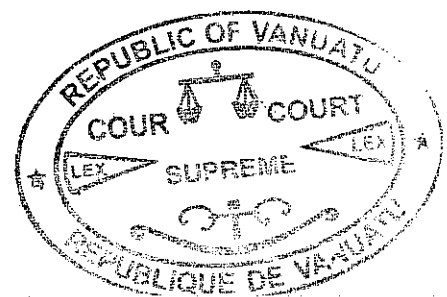
Charges must be considered separately

18. Each charge must be considered separately, as though each charge had its own separate trial.

General Principles

Burden and standard of proof

19. The Prosecution has the onus of proof and is required to establish the elements of each charge beyond a reasonable doubt before a finding of guilt can be made in respect of the charges. This excludes consideration of any possibility which is merely fanciful or frivolous. Mr Lewis is not required to establish anything.



20. This was confirmed to Mr Lewis prior to the prosecution opening its case. I read the statement required by s 81 of the Criminal Procedure Code out to Mr Lewis.

Caution statement

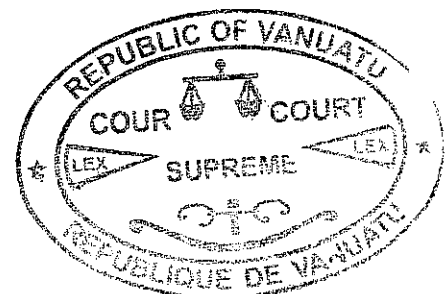
21. Mr Lewis was arrested by Officer Jimmy on 22 January 2021. While Mr Lewis signed a statement, that simply recorded that he would speak in court. That is his absolute right. He had no obligation to make a statement to police. Deciding not to speak to police cannot be held against Mr Lewis and does not add to the prosecution case.

Defence evidence

22. Mr Lewis elected to both give and call evidence after the s88 statement was read to him. That did not change who has to prove the charges. By giving and calling evidence, Mr Lewis did not take on any burden. The burden of proving the charges remained with the prosecution from beginning to end.

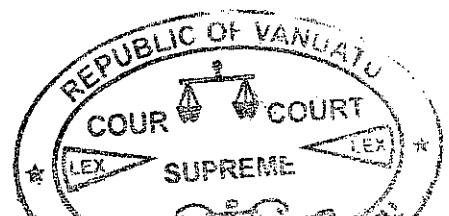
Approach to assessing the evidence

23. This case turns on the credibility and reliability of the witnesses.
24. It is therefore important to distinguish between credibility and reliability. Credibility is about truthfulness. So, credibility is about whether a witness can be believed? Reliability is about the accuracy of evidence which is honestly given. The first involves an intention to mislead or lie. The second involves error or mistake. Even the most honest witnesses capable of being mistaken, particularly when being asked to recall events which occurred many years ago. But a witness who sets out to give false evidence is an entirely different position. All of what is said may be called into question if the witness is setting out to be dishonesty in some or all respects.
25. I may accept everything a witness has said. On the other hand, I may reject everything a witness has said. There is a middle ground, which is that I can accept some parts of what a witness has said and reject other parts.
26. It is important that before relying on evidence, I am able to conclude that it was honestly given, but also that it is reliable.



27. In assessing the evidence given by the witnesses, there are a number of factors which assist with considering whether the witnesses gave truthful and accurate evidence. In considering the evidence of all the witnesses who gave evidence during the trial, I have considered the reasonableness, probability and coherence of the evidence. Sometimes conflicts or differences in the evidence can be caused by mistakes and misinterpretation; sometimes witnesses can see and hear things that were not seen and heard by other witnesses. This does not mean one of the witnesses is necessarily not telling the truth. Sometimes conflicts are not able to be explained away.
28. The witness' demeanour is a small part of my assessment of the witness. I prefer though to look at what the witness actually said, and take into account;
- a. consistency within the witness' account and over time? If there is an inconsistency, it does not necessarily mean that the evidence in court cannot be relied on. The mere fact that a witness is inconsistent on a particular topic does not mean that person is generally untruthful or inaccurate. Inconsistencies can happen even when someone is telling the truth. I must consider whether that inconsistency is a significant one or a minor one and any explanation given for the inconsistency;
 - b. consistency when comparing the witness' account with relevant exhibits;
 - c. consistency with the evidence of other witnesses whose evidence I have accepted.
 - d. Whether there is supporting evidence. There does not have to be, but it may help.¹
 - e. the inherent plausibility and coherence, or not, of the witness' account. Does it make sense?
29. It is important that I consider each witness' evidence in the context of all the evidence in the case. Also, witnesses can be inaccurate or may not remember secondary, marginal or important facts for various reasons, including that they were not seen as important at the time. However, their evidence may be accurate about essential matters, but not about details. Essential matters are matters which relate to the elements of the charges.
30. I reminded myself that if I am to draw inferences, they cannot be guesses or speculation but had to be logical conclusions drawn from reliably accepted or properly established facts. As was said by the Court of Appeal in *Swanson v Public Prosecutor* [1998] VUCA

¹ There is no general requirement for corroboration; *Walker v Public Prosecutor* [2007] VUCA 12 at [15].



9, inferences may be drawn from proved facts if they follow logically from them. If they do not, then the drawing of any conclusion speculation not proof. Speculation in aid of an accused is no more permissible than speculation in aid of the prosecution. Inferences need not be irresistible.

The evidence

31. The prosecution called 4 witnesses; Mr de Groot, Mr Chillia and two police officers, Officer Titus and Officer Jimmy. Two exhibits were produced- an email sent by Mr de Groot to Officer Titus the same day as the alleged events and Mr Lewis' cation statement.
32. Mr Lewis elected to give and call evidence. He gave evidence as did his partner, ms Bowden. Two defence exhibits were produced- a letter sent by Mr de Groot's wife to the Public Prosecutors' Office and a legal letter.
33. I do not intend to refer to all the evidence but will address the relevant evidence in considering each charge. In relation to the letter sent by Mr de Groot's wife, I place no weight on it. The key issue in this trial is the credibility and reliability of the witnesses and the letter did not assist with that assessment.

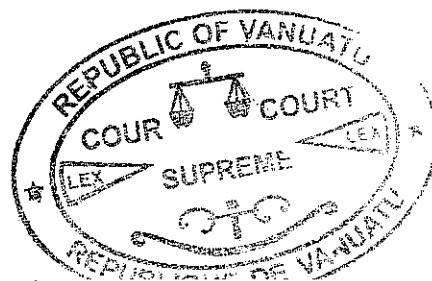
Charge 1 – Threat to kill

Am I sure that Mr Lewis directly caused Mr de Groot to receive oral threats to kill him ?

34. This is the key issue in relation to this charge. The prosecution case is that when Mr de Groot and Officer Titus were at Mr Lewis' property, Mr Lewis, angry and aggressive, threatened to kill Mr de Groot by saying to him;

“You don't know who you are dealing with. You are dead. I will find where you live. I will kill you and your fucking family. ”

35. The defence case is that Mr Lewis would never have made such a threat.
36. Mr de Groot and Officer Titus did a rental inspection at “Nomata” on 19 January 2021. Mr de Groot said the officer was satisfied that the house was in good order. Following the inspection, they went to Mr Lewis's house on Devils Point Road to return the keys

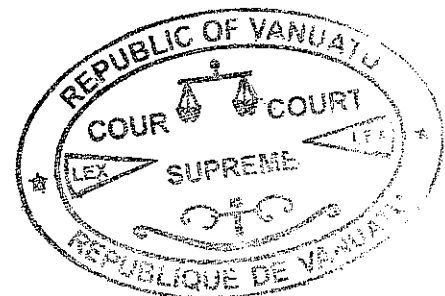


and inform him about the security. Mr de Groot said that he and Officer Titus had discussed security in the form of a fridge and two small cabinets against the bond.

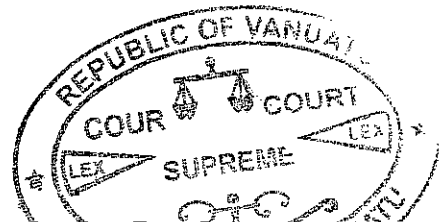
37. Present at Mr Lewis's address were Mr de Groot, Officer Titus, Mr Lewis and his partner, Ms Bowden
38. Mr de Groot said that when Mr Lewis came out of the house, he was agitated, wondering why they were there. He said he explained that he and Officer Titus had done the final inspection and that he wanted his bond back and that he had an invoice for repairs. Mr Lewis said, "*see you in court*". So, he proceeded to explain that they had taken security against the bond. He didn't know if he was able to say it all.
39. Mr de Groot said that Mr Lewis lost all self-control and basically tried to swing at him. He said that Mr Lewis walked aggressively towards him and had a strong voice. Mr de Groot said that you can tell when someone is agitated. Officer Titus was standing to his right and he jumped in. Mr Lewis was screaming and saying-

"You don't know who you are dealing with. You are dead. I will find where you live. I will kill you and your fucking family."

40. When Mr de Groot heard the threats made by Mr Lewis, he felt shocked and scared. He was worried. He explained that he has young children. It is his responsibility to look after and protect him. He was very concerned.
41. When cross examined, Mr de Groot confirmed that he made a statement to police on 21 January 2021. He reluctantly conceded that he did not use the word "*kill*" in that statement. While Mr de Groot accepted that the word "*kill*" was not in his initial statement, he said that Mr Lewis was not saying he would die of old age.
42. In re-examination, Mr de Groot explained why he had not used the word "*kill*" in his initial statement. He said he did not write everything down that was said. He was a bit frustrated with the police for losing his statement.
43. Mr de Groot said that Mr Lewis screamed "*you don't know who you are dealing with*" while officer Titus was trying to restrain him. Mr Lewis screamed lots of things. Officer Titus told him to get into the car. Mr Lewis's partner was trying to restrain him, and Officer Titus was trying to calm Mr Lewis down.

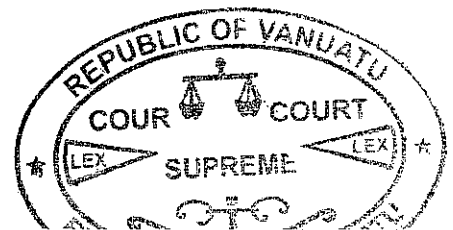


44. Officer Titus got into the car and told him to drive and as he reversed, Mr Lewis came running up to the car and jumped kicked the front side of his truck. This is not in dispute. All witnesses confirmed that Mr Lewis kicked Mr de Groot's vehicle.
45. According to Mr de Groot, when he and Officer Titus went to the police station to report the incident, Mr Lewis and his partner quickly got into cars and followed him to the police station.
46. Mr de Groot did not accept that he was aggressive and vocal when he arrived at the property. He denied saying *"pay me my money now or else"*. To the contrary, Mr de Groot said he was very calm and very nervous about Mr Lewis. He does not like confrontation and try to be as calm as possible. He rejected the proposition that Mr Lewis told him to leave and that the bond situation would be resolved properly in due course. Mr de Groot said he was threatened. He was told to go to the car. There was a lot of commotion. He did not hear Mr Lewis telling him to leave and they would sort the bond situation out properly.
47. As noted, Officer Titus was with Mr de Groot. He said that Mr de Groot got out to talk to Mr Lewis. As the two men were talking, he observed Mr Lewis' reaction and body language. He could tell something was wrong, so he got out of the truck. As he was walking towards them, he signalled to Mr de Groot to come back to the truck. This was so he could speak to Mr Lewis. He could see that Mr Lewis was aggressive and that he wanted to do something to Mr de Groot. From his perspective, he could see that from the way Mr Lewis was walking and the way Mr de Groot was talking,
48. Officer Titus heard Mr Lewis say *"you don't know who you are dealing with. You are a dead man. You dead"*. He clarified that Mr Lewis said *"you dead. I will find where you are living and I will fuck you, together with your fucking family"*.
49. Officer Titus' statement was not made on 22 June 2022, 17 months after the incident. He confirmed to Mr Morrison he made notes about the incident once he got back to the station. However, since then he has been moved from one office to another. So, his notebook has been misplaced. He tried to find it, to no avail.
50. Officer Titus' narrative about the threat is identical to what Mr de Groot told police 17 months earlier. When asked by Mr Morrison, he said he was not aware of that. He denied having seen Mr de Groot's statement. He said he was there at the time.
51. Mr Lewis gave evidence. He said he was not expecting a visit from Mr de Groot on 19 January 2021. His partner, Catherine Bowden, called to him to come outside. He saw



Mr de Groot, and a police officer who was in the vehicle. He understood Mr de Groot had come to return the keys and wanted the bond (VT 50,000) and reimbursement for costs he had paid. Mr de Groot said, "return my bond or else". He replied, "Or else, what?". Mr de Groot then told him he had stolen his furniture as collateral. Mr Lewis felt that Mr de Groot was trying to extort him by holding the furniture as collateral. He lost his temper. Mr Lewis did not recall what he said. His evidence is that he would not have threatened his life or brought his children into it. He said it was completely out of his character.

52. Mr Lewis was asked to comment on the alleged threat and the particular words used. His response was that he probably said, "you don't know who you are dealing with". As for the "you are dead" comment, he said he did not remember the situation as it was 3 years ago, He said he would definitely not have made such a threat and definitely would not threaten their children. Mr Lewis acknowledged he most probably swore and used the "f" word liberally. Mr Lewis remained firm that he would not threaten Mr de Groot and did not use the words alleged. He said he believed it to be false.
53. When Mr Young suggested to him in cross examination that he aggressively confronted Mr de Groot, Mr Lewis said he believed the situation was aggressive and went both ways. He accepted that he was angry and speaking aggressively – that he was definitely not happy with him.
54. Mr Lewis accepted that the jump kicked the front of Mr de Groot's vehicle as described. Once Mr de Groot and Officer Titus left, he and his partner decided to go into town and make their own report. As they did so, they noticed Mr de Groot's vehicle at the end of their extended drive way. He explained that Devils Point Road is about 12-15 km long. His property is at the beginning of the road, the rental property is at the end of the road and Mr de Groot's new rental property was about 2/3 of the way along the road. He denied that he followed Mr de Groot's vehicle because he wanted to kill him.
55. Ms Bowden said that Mr Lewis asked Mr de Groot very firmly to leave the property, but he did not do so. He asked about getting the bond back and a refund for repairs for work done to the house. He was asked to leave firmly by Mr Lewis but refused and kept refusing to leave. Ms Bowden said he kept asking for money and demanding return of the bond. she told him they hadn't inspected the house and would return it after an inspection-something was said about 30 days.
56. Mr de Groot said he had taken some furniture to hold until the bond had been returned to him. She was shocked. Ms Bowden said Mr Lewis snapped; he was very angry, as Mr de Groot had admitted that he had taken their property. She said Mr Lewis was very

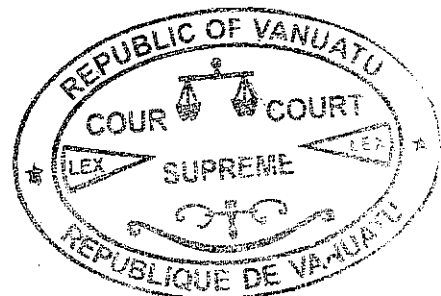


angry and was using expletives. In re-examination, Ms Bowden said she had never seen Mr Lewis as he was that day. She said he was really, really mad. She recalls him telling Mr de Groot to get the "f" off the property.

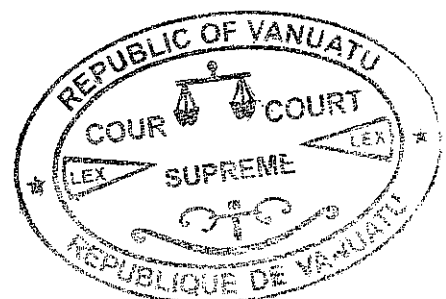
57. Ms Bowden said that Mr Lewis and Mr de Groot yelled at each other. She told Alex to leave, saying "You need to leave. This is not a good place for you to be". Mr Young asked her about what Mr Lewis had said. He suggested to her that amongst the "f" words, Mr Lewis threatened Mr de Groot. She said she did not recall Mr Lewis saying that. Candidly, Ms Bowden accepted that it was possible that she had forgotten what was said at the time.

Discussion

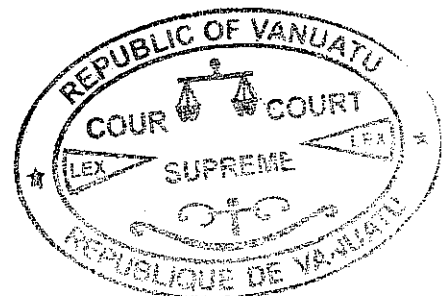
58. There is no doubt that Mr Lewis was very angry with Mr de Groot. All the witnesses agree on that. Did that lead to Mr Lewis making a threat to kill Mr de Groot?
59. I start with Mr Lewis evidence about the threat to kill. He does not have to prove anything but if there is a reasonable possibility that his evidence about what he said (or didn't say) is true, then the prosecution would not have proved that he made an oral threat to kill.
60. Mr Lewis accepts he most probably made the comment "*you don't know who you are dealing with*" but says he would not have threatened to kill Mr de Groot. I consider that Mr Lewis evidence that he cannot recall what he said and whether he made a threat to be improbable. Even though the incident took place three years ago, it was a significant event for Mr Lewis. Mr Lewis confirmed he was angry particularly about Mr de Groot retaining his items, essentially as a bargaining chip for return of the bond. As he said, he felt he was being extorted. It was a big event as it culminated in Mr Lewis in being spoken to by police, bailed and facing a charge. On the other hand, he recalls kicking the car and that he did not take a swing at Mr de Groot, yet on the other does not recall whether he threatened Mr de Groot. That has an air of unreality to it. His lack of recall is surprising and unconvincing. I put his evidence about the threat to one side.
61. What of the evidence of the prosecution witnesses?
62. I assess that there are question marks about the credibility and reliability of Mr de Groot's evidence generally and specifically in relation to the content of the threat.



63. Mr de Groot's evidence about the circumstances of the items taken as security raises an issue as to his credibility. Mr de Groot implicated Officer Titus in the decision-making process saying that he took the items as security with Officer Titus' knowledge.
64. In cross examination, Mr de Groot was asked about the circumstances of the items being taken as security. Mr de Groot confirmed that he is occasionally involved in the renting and leasing of properties but did not accept a proposition put to him by Mr Morrison that it is neither normal nor appropriate to take away items to strengthen a position regarding a bond. He said that in his experience, it was quite common.
65. Initially, Mr de Groot said that he did not recall if the fridge and cabinets were taken in the presence of Officer Titus. When Mr Morrison suggested to Mr de Groot that either he took them in Officer Titus' presence or prior to that, he said he discussed it with Officer Titus as trying to find a solution to return of the bond. Mr de Groot explained that his parents in law live on Devil's Point Road and their work man came and collected the security items after he discussed it with Officer Titus. Mr de Groot confirmed that he took the items as security with Officer Titus's knowledge. He said Officer Titus agreed.
66. This is in direct contrast to Officer Titus evidence about what he knew about the security items. He said that on the way to Mr Lewis' home, Mr de Groot told him that he had taken items by way of security for the bond. When asked by Mr Morrison, Officer Titus said he had not seen the items taken as security and that Mr de Groot told him he had taken two items of property from the house. Officer Titus also said he told Mr de Groot he should return the items, which he did later that day.
67. I do not accept that Officer Titus had any involvement in the decision-making process about these security items. Officer Titus and Mr de Groot did not know each other prior to 19 January 2021. It strains credibility to think that a police officer of 26 years' experience would condone, if not be complicit in, potentially criminal behaviour. The items did not belong to Mr de Groot. He had no right to them. According to Mr de Groot, on the one hand Officer Titus agreed with Mr de Groot taking the items as security, but on the other hand, there is Officer Titus' evidence he told Mr de Groot he should return them. It does not make sense that Officer Titus would agree with Mr de Groot but then tell him to return the items. While I acknowledge that this issue does not directly relate to an element of either charge it nevertheless gives pause for thought as to Mr de Groot's credibility in an overall sense as I consider that Mr de Groot did not tell the truth about Officer Titus' involvement in the taking of the security items. Mr de Groot believes that it is common practice to take items as security. However, if there is such a practice, it cannot legitimise potentially criminal behaviour.



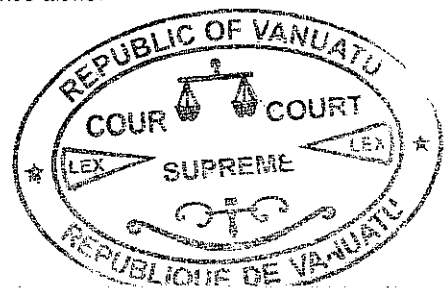
68. Then there are the inconsistencies between Mr de Groot's evidence about the threat and;
- a. what Mr de Groot said to police in his statement 2 days after the incident, and
 - b. Officer Titus' evidence about the threat.
69. A matter directly related to the threat to kill is what Mr de Groot told police in the immediate aftermath of the incident about the threat as opposed to his evidence. When the incident was fresh Mr de Groot did not mention to police that Mr Lewis used the word "kill". His evidence during the trial though included that Mr Lewis said he would kill Mr De Groot and his fucking family. Mr de Groot's explanation for not mentioning the word "kill" 2 days later is that he did not write down everything that was said, and that he was a bit frustrated that police had lost his statement.
70. The mere fact of an inconsistency may not impact on credibility. Factors to take into account include whether it is a minor or material inconsistency and any explanation offered. While I acknowledge Mr Young's submission that this is not a material consistency, I assess that it is. It is not a minor inconsistency as it is directly relevant to the content of the threat. Mr de Groot has a very negative view of Mr Lewis and made an immediate complaint to police, indicative of his concern. I infer then that Mr de Groot would not have hesitated to tell police in the immediate aftermath, when things were fresh, that Mr Lewis had made a direct threat to kill him and his family, if that in fact had been said. Mr de Groot's explanation is improbable. I do not accept that he would have omitted such an important detail when he was telling police what happened when it was fresh in his mind, and he was so concerned that he made an immediate complaint to police.
71. As such, the difference between Mr de Groot's evidence about the content of the threat and what he told police in January 2021 is a material inconsistency and impacts on the credibility of Mr de Groot's evidence about the threat. The inconsistency between his evidence and Officer Titus' is relevant as Officer Titus did not hear Mr Lewis use the word "kill" but I do not place much weight on that as I assess that there is an issue about the reliability of Officer Titus' recall as to what was said.
72. There are question marks about the truthfulness of Mr de Groot's evidence generally as detailed and specifically in relation to the content of the threat. So, I am unwilling to



rely only on his narrative, and need to assess what other evidence there is to support Mr de Groot's evidence.²

73. Officer Titus' evidence is that Mr Lewis did make a threat to Mr de Groot, including saying "you dead". According to his evidence, Mr Lewis did not use the word kill. Officer Titus' evidence about what Mr Lewis said mirrors what Mr de Groot initially said to police.
74. Officer Titus did not know Mr de Groot prior to the incident. He gave his evidence in a straightforward manner, has no personal investment in this matter, so has no reason to give evidence to support Mr de Groot. I accept that he is a truthful witness. But before I can rely on evidence, it must be both credible and reliable. Officer Titus said he made notes about what happened when he returned to the police station. But his notebook has been mislaid. A police officer's notebook is a key tool for a police officer and care should be taken then with notebooks. Relevantly, Officer Titus did not make a statement until 17 months after the incident. The fact that Officer Titus' recall matches Mr de Groot's statement is curious. That could be because he was there as he said, but his detailed recall is surprising given that he did not make a statement until 17 months later, when his memory of events cannot be said to be fresh, and he does not have his notebook to refresh his memory about what happened in 2021. It seems a little improbable. Officer Titus' recall can be contrasted with Ms Bowden's candid acknowledgement that it was possible she had forgotten what was said at the time. I consider that the time lapse between the events of 19 January 2021 and when Officer Titus made his statement does impact on the accuracy of his evidence.
75. In terms of the defence case, there is Ms Bowden's evidence. She said she did not hear Mr Lewis make a threat to kill Mr de Groot as alleged. She was candid and made appropriate concessions. She was matter of fact and did not hesitate to acknowledge Mr Lewis' shortcomings. For example, she freely acknowledged that Mr Lewis was very angry and that, as noted, it was possible she had forgotten what was said at the time. That reflects that the witnesses were recalling things that took place over 3 years ago. I consider then that Ms Bowden is a truthful witness. But as with Officer Titus, the passage of time is a matter that impacts on the accuracy of her evidence as she candidly acknowledged.

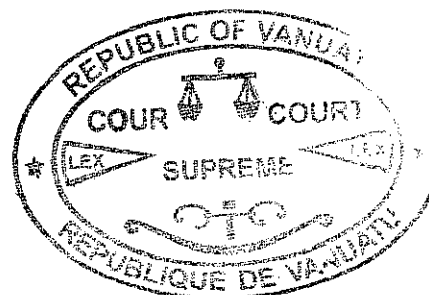
² Corroboration is not generally required. But give the credibility issues raised about Mr de Groot's evidence, I cannot be sure about the words used by Mr Lewis based on Mr de Groot's evidence alone.



76. Is there credible and reliable supporting evidence of a threat to kill? In considering the issue of whether the threat was made, I have taken into account the context and circumstances, which include that Mr Lewis was extremely angry. The "red mist" descended because Mr Lewis was angry in particular about Mr de Groot taking items as security. This lends credibility to Mr de Groot and Officer Titus' evidence.
77. The evidence of Officer Titus supports Mr de Groot's evidence about the words used by Mr Lewis, including "you are dead". While I consider Officer Titus to be a generally truthful witness, there is a question mark about the accuracy and reliability of his evidence about what Mr Lewis actually said. I refer to the discussion at paragraph 74. There is an issue as to the reliability of Officer Titus' evidence.
78. Also, Officer Titus' evidence is in conflict with Ms Bowden's evidence. I assess Ms Bowden to be a generally truthful witness, but she candidly acknowledged that it was possible she had forgotten what was said at the time. There is a question mark about whether she accurately recalled what Mr Lewis said. Similarly, there is an issue as to the reliability of Ms Bowden's evidence. I cannot say then that I prefer either Officer Titus' or Ms Bowden's evidence over the other about whether there was a threat and what words were used. Both gave truthful but possibly inaccurate evidence about what was said.
79. While it may be possible that Mr Lewis used the words as described by Mr de Groot and Officer Titus and so made a threat to kill, I cannot be sure given my assessment of Mr de Groot's evidence, and the possible unreliability of Officer Titus' recall. Then there is the conflict between Officer Titus' evidence and Ms Bowden's evidence. A possibility is not enough. I am left with a reasonable doubt.
80. I find Mr Lewis not guilty of charge 1.

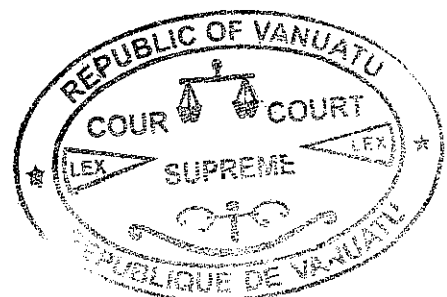
Charge 2- attempted intentional assault

81. The key issue in relation to this charge is whether Mr Lewis tried to swing at and punch Mr de Groot. The prosecution case is that Mr Lewis intended to assault Mr de Groot as he was angry, aggressive and took a swing at him in circumstances where they were about 2 metres apart. The defence case is that he did not swing at or attempt to punch Mr de Groot.



Am I sure that Mr Lewis had an intention to assault Mr de Groot ?

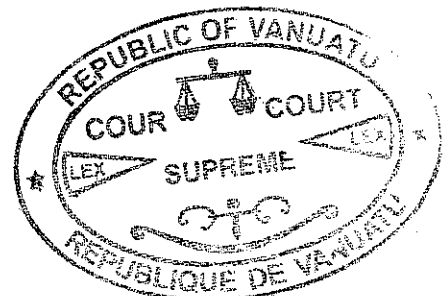
82. As detailed above, in setting out the context of the threat to kill allegation, Mr de Groot said that Mr Lewis lost all self-control and basically tried to swing at him and was very aggressive. He explained that he was standing in front of his vehicle. Mr Lewis was 2 metres away and tried to punch him. Mr de Groot saw his right arm go up and said the expression on Mr Lewis' face was wild. Officer Titus jumped in before the punch could land.
83. Officer Titus' evidence is that as Mr Lewis was talking, he was pointing at Mr de Groot and walking towards him. He was pointing his finger at Mr de Groot. They were 4-5 metres apart. Officer Titus believed him to be angry, but when Mr Lewis saw officer Titus he started to calm down. Mr Lewis told him Mr de Groot had taken two items of property of his from the house. Officer Titus told him he would talk to Mr de Groot and get him to return the property.
84. Mr Lewis said there was no physical contact between he and Mr de Groot. Specifically, he did not raise his right hand in a threatening manner towards him, and nor did he take a swing at Mr de Groot. He confirmed there was no physical contact with Officer Titus either. Mr Lewis agreed that he tried to approach Mr de Groot but denied that he lifted his right hand and swung it at Mr de Groot. When this was put to him by Mr Young, Mr Lewis said that was false. He was never close enough. Although he did not recall pointing at Mr de Groot, he acknowledged it could have been some of the body language he was displaying.
85. Ms Bowden, as set out above, said that Mr Lewis was very angry. However, she did not see any physical altercation between Mr Lewis and Mr de Groot. She said they were not close enough as Mr Lewis was at the top of the driveway and Mr de Groot was close to his truck. She was asked about the distance by Mr Young. She estimated that it was probably the distance between she and Mr Lewis in the courtroom. Counsel agreed the distance was more than 2 metres but less than 4 metres. In cross examination, Ms Bowden said that Mr Lewis confronted Mr de Groot verbally saying he did not like what Mr de Groot had done. She did not think he was aggressive towards Mr de Groot. She said he was angry and said it was her observation that Mr Lewis was not happy with Mr de Groot or the situation. Ms Bowden remained firm in cross examination that she did not see Mr Lewis lift up his right hand and attempt to swing or swing at Mr de Groot.



Discussion

86. There is no direct evidence of Mr Lewis intention because he denies that anything beyond verbal abuse took place. An act is intentional if done consciously and deliberately. Intention is to be assessed taking into account all relevant circumstances, including Mr Lewis' words and actions.
87. As noted, it is not in dispute that Mr Lewis was very angry with Mr de Groot. The evidence about whether Mr Lewis acted on his anger and intended to assault Mr de Groot diverges from this point. Mr de Groot says that Mr Lewis took a swing at him and tried to punch him when they were 2 metres apart.
88. Mr de Groot's evidence is in direct conflict with Officer Titus evidence. Officer Titus did not see Mr Lewis take a swing at Mr De Groot. He said that he saw Mr Lewis pointing a finger at Mr de Groot. He said they were 4-5 metres apart. In his written submissions, Mr Young submitted that it was possible that Officer Titus might not have seen Mr Lewis trying to punch Mr de Groot. He acknowledged that Officer Titus did not specifically mention that Mr Lewis swung at Mr de Groot or tried to punch him but submitted that this does not rule out Mr de Groot's evidence that it happened. He submitted that Officer Titus was in the truck when he observed that Mr Lewis could do something to Mr de Groot and so intervened. So, he might not have seen the incident. As such, the evidence is not inconsistent. The fact that Officer Titus saw Mr Lewis pointing at Mr de Groot supports his evidence that Mr Lewis' hand was up.
89. With respect, Mr Young's submission is speculative. I cannot draw a conclusion that Officer Titus might not have seen the incident. Officer Titus gave evidence about what he saw, which is that Mr Lewis pointed his finger at Mr de Groot from a distance of 4-5 metres. There is nothing in the evidence from which I could draw a conclusion that Officer Titus somehow missed part of what happened that day. It would be speculation. As was said in *Swanson v Public Prosecutor*, speculation in aid of an accused is no more permissible than speculation in aid of the prosecution.
90. In terms of the evidential conflict, I prefer Officer Titus' evidence. For the reasons already discussed, I assess that he is a truthful witness. I accept Officer Titus's evidence that at a distance of 4-5 metres Mr Lewis pointed his finger at Mr de Groot.
91. I do not accept Mr de Groot's evidence about Mr Lewis taking a swing or trying to punch him as:

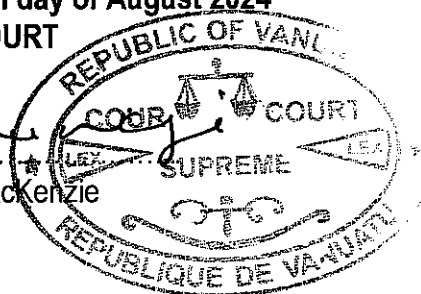
- a. I prefer Officer Titus' evidence.



- b. There is an issue as to Mr de Groot's credibility given that I assess he did not tell the truth about Officer Titus' involvement in the taking of the security items.
- c. I consider that Mr de Groot embellished what happened when he said Mr Lewis tried to punch him.
92. In assessing the circumstances and Mr Lewis' words and actions I accept that the evidence very clearly shows that Mr Lewis was very angry with Mr de Groot. Mr Lewis was verbally inappropriate using the "f" word and his anger manifested itself by him kicking Mr de Groot's vehicle, which is rather immature. However, I do not accept that Mr Lewis took a swing at Mr de Groot or raised his arm given the evidential conflict between the two prosecution witnesses, and that I prefer Officer Titus' evidence. They cannot both be right. In such circumstances, I do not need to consider that defence evidence. I would simply add though, Ms Bowden's evidence supports Officer Titus' evidence about whether Mr Lewis took a swing at Mr de Groot.
93. In and of itself it would be speculative to find that because Mr Lewis was very angry and verbally abusive that he had an intention to assault Mr de Groot, particularly bearing in mind Officer Titus's evidence that Mr Lewis and Mr de Groot were 4-5 metres apart. I cannot be sure that in all the circumstances that Mr Lewis had an intention to assault Mr de Groot. I place significant weight on the fact that I do not accept that Mr Lewis took a step towards an assault, by swinging at him or trying to punch him, as Mr de Groot alleged.
94. I find Mr Lewis not guilty of charge 2. ³

**DATED at Port Vila this 13th day of August 2024
BY THE COURT**


Justice M A MacKenzie



³ As an aside, I would not be sure that Mr Lewis took a step towards committing that crime for the same reasons detailed above.